Supreme Court of the United States

No. 72-1690

Harold Omand Spence,

Appellant,

v.

Washington

APPEAL from the Supreme Court of the State of Washington.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 9, 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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IN THE

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No. .....

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

The Appellant, Harold Omand Spence, appeals from a decision of the Supreme Court of Washington, reversing a decision of the Court of Appeals and remanding the cause to the King County Superior Court for reinstatement of judgment and sentence. The decision of the Supreme Court of Washington was filed on January 18, 1973, and a petition for rehearing was denied on March 13, 1973. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below

The opinions of the Supreme Court of Washington are reported at 81 Wn.2d 788, 506 P.2d 293 (1973), and are set forth in the Appendix, *infra,* at pp. 25a-58a. The opin-

ions of the Court of Appeals are reported at 5 Wn. App. 752, 490 P.2d 1321 (1971), and are set forth in the Appendix, *infra*, at pp. 1a-24a.

Jurisdiction

The decision and judgment of the Supreme Court of Washington was filed on January 18, 1973. Appellant's petition for rehearing was denied on March 13, 1973, and his notice of appeal was filed in the Supreme Court of Washington on April 10, 1973 (App., *infra*, p. 60a). The jurisdiction of this Court to review the decision by appeal is conferred by 28 U.S.C. §1257(2) and is sustained by the following decisions: *Cohen* v. *California*, 403 U.S. 15 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

Statutes Involved

Revised Code of Washington §9.86.010 (1919):

> *"Flag," etc., defined.* The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

Revised Code of Washington §9.86.020 (1919):

> *Improper use of flag prohibited.* No person shall, in any manner, for exhibition or display:

(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; . . .

Questions Presented

1. Whether the State of Washington, consistent with the First and Fourteenth Amendments to the Constitution of the United States, may punish Appellant for violation of a criminal statute, which prohibits improper use of the flag, for displaying an American flag with a peace symbol on it under the circumstances of this case.

2. Whether Revised Code of Washington §9.86.020 is impermissibly overbroad or vague in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

On May 10, 1970 the Appellant, Harold Omand Spence, displayed an American flag, upon which was superimposed a "peace symbol" constructed of removable tape, outside the window of his apartment in Seattle, Washington (App., *infra*, p. 6a). The display was observed by three Seattle

police officers who arrested the Appellant and seized the flag.

The Appellant was subsequently charged with improper use of the flag under Revised Code of Washington §9.86.020 (2) in a criminal complaint alleging as follows:

> He, the said Harold O. Spence, in the county of King, state of Washington, on or about the 10th day of May, 1970, willfully, unlawfully and knowingly for exhibition and display, did expose to public view a flag of the United States upon which there was then and there attached and affixed a mark, picture design or drawing, to-wit: a large black circle with connecting straight lines within (St. 9).[1]

The case was tried to a jury in the King County Superior Court.[2] The three arresting officers testified that they had observed the flag displayed from the Appellant's window with what they identified as a peace symbol on it. They entered the apartment building and were met by the Appellant who, referring to the flag, volunteered, "I didn't know there was anything wrong with it. I will take it down" (St. 2).

The Appellant testified that he had displayed the flag with a peace symbol on it, and had done so for the purpose of associating the American flag with peace in protest of the recent invasion of Cambodia and of the deaths at Kent State University. He explained that he had chosen masking

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[1] "St." referencess are to the Agreed Statement of Facts which comprised the record on appeal below.

[2] The case was appealed to the Superior Court from a conviction in the Seattle District Court. The latter is not a court of record and the trial in Superior Court was a trial *de novo*.

tape so that the peace symbol could be removed without damage to the flag (St. 2, 3).

The Appellant was found guilty and given a suspended sentence of ten days in jail and a fine of seventy-five dollars plus court costs (St. 3).

The federal constitutional claims presented by this appeal were raised in the trial court by motions to dismiss prior to the impanelling of the jury (St. 2), after the state rested and at the close of the defendant's case (Appellant's Opening Brief in the Court of Appeals, 5), by taking exception to the trial court's second and third instructions and by several proposed instructions which were not given (St. 3), and by a motion for a new trial (St. 3). They were considered on appeal by the Court of Appeals and the Washington Supreme Court.

The Court of Appeals reversed the conviction in a 2-1 decision which held the statute under which the Appellant was charged unconstitutionally overbroad (App., *infra*, pp. 18a-19a).

The Washington Supreme Court in turn reversed the decision of the Court of Appeals in a 6-1 decision. In characterizing the First Amendment issue before them, Justice Hale, writing for himself and three others, observed:

> The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States . . . as a medium of communication. 81 Wn.2d at 798-99 (App., *infra*, p. 39a).

With respect to the Appellant's interest in the speech activity at issue, the majority stated:

> whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal . . . . *Ibid.*

And with respect to the state's interest invoked to justify restriction of Appellant's fundamental right:

> We think it beyond argument that the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment and alien markings and designs. *Ibid.*

The majority rejected the overbreadth challenge holding that the Appellant lacked standing to attack, on the ground of overbreadth, a statute which the court found unobjectionable as applied to him (App., *infra,* p. 34a). Two justices concurred in the result but took issue with the majority's treatment of the overbreadth issue on the ground that "[u]sing nonfirst amendment cases to support a first amendment issue undermines the majority rationale" (App., *infra,* at p. 43a).

Justice Finley dissented on the grounds that the Appellant's activity was protected under the First Amendment, that the statute under which he was convicted was unconstitutionally overbroad on its face and that in any event a conviction could not be upheld without proof of evil intent (App., *infra,* pp. 49a, 51a, 57a-58a).

The Questions Are Substantial

This case involves a serious incursion by the State of Washington on freedoms protected by the First Amendment. It presents for this Court's review a statute which restricts use—as distinguished from desecration—of the American flag, and does so in a manner which substantially curtails the right of citizens to engage in peaceful political speech.[3] Furthermore, the approach of the Washington Supreme Court to the First Amendment issues here presented reflects a restrictive view of the freedom of speech which is fundamentally at variance with the view of this Court.

1. *Appellant's activity was protected speech.*

Although his medium was neither spoken nor written words, Appellant's communication of his antiwar message

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[3] New York's virtually identical use statute was reviewed and struck down on First Amendment grounds in *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2nd Cir. 1970), *juris. statement filed*, 39 U.S. Law Week 3438 (No. 70-1507, March 24, 1971) and Connecticut's was more recently invalidated in *Thoms* v. *Heffernan*, 473 F.2d 478 (2d Cir. 1973), *pet. for cert. filed*, 41 U.S. Law Week 3555 (No. 72-1359, April 9, 1973).

Just recently, this Court granted review of a First Circuit decision holding a Massachusetts flag contempt statute unconstitutional. *Goguen* v. *Smith*, 471 F.2d 88 (1st Cir. 1972), *prob. juris. noted*, 41 U.S. Law Week 3616 (No. 72-1254, May 21, 1973). While the issues in *Goguen* are, of course, closely related to the ones tendered here, this case, like *Long Island Vietnam Moratorium Committee* v. *Cahn*, *supra*, presents the somewhat different question of a statute prohibiting improper use of the flag in the absence of an intent to desecrate it. Despite the possible distinction between the "desecration" statute at issue in *Goguen* and the "use" statutes at issue herein and in *Long Island Vietnam Moratorium Committee*, Appellant suggests that it would be appropriate to consider the cases together. It should be noted that no action has been taken in connection with the Jurisdictional Statement and Motion to Affirm in *Long Island Moratorium Committee*, *supra*, despite its pendency since April, 1971.

was speech. The display of his flag and peace symbol was expression comparable to the display of a different flag, *Stromberg* v. *California,* 283 U.S. 359 (1931), or the wearing of an armband, *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503 (1969), or the holding of a silent vigil or other peaceful demonstration, e.g., *Brown* v. *Louisiana,* 383 U.S. 131 (1966); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). As speech, Appellant's activity was presumptively entitled to protection under the First and Fourteenth Amendments, for it is "the usual rule that governmental bodies may not prescribe the form or content of individual expression," *Cohen* v. *California,* 403 U.S. 15, 24 (1971), and "the State has a heavy burden to demonstrate that [the proscription under review] presents . . . an exceptional case," *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 504 (1952). In assessing the prohibition enforced against Appellant, this Court "must weigh heavily the fact that communication is involved," *Grayned* v. *City of Rockford,* 408 U.S. 104, 33 L. Ed.2d 222, 232 (1972), and "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

Appellant contends that Washington's prohibition of his peaceful and respectful speech activity is not only unnecessary to the promotion of a compelling state interest, it cannot be justified by reference to any legitimate governmental interest whatsoever—that is, by reference to any interest "unrelated to the suppression of free expression." *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968).[4] Since

[4] In *Goguen* v. *Smith, supra,* 471 F.2d 88, the First Circuit reached the same conclusion about a flag contempt statute, after an exhaustive analysis of the state interests which might possibly be advanced by such a statute.

the state has the burden of demonstrating the contrary, it is appropriate to look first to the interest which it has tendered.

In its brief below (at p. 9), the state commented without elaboration:

> The legitimate state interest is, of course, preservation of the peace.

If this was, indeed, the state's concern, it could hardly justify a prosecution under the facts of this case. There is certainly nothing in the record to suggest that a disturbance was imminent. The quiet, unobtrusive symbolic display from Mr. Spence's window was observed only, so far as the record discloses, by three policemen, and there is no indication that they were in any way disconcerted. Indeed, the Washington Supreme Court did not even mention "preservation of the peace" as a reason for sustaining the statute. Preservation of the peace cannot be the legitimate interest in curtailing activity which poses no plausible threat to the peace. *Cohen* v. *California, supra,* 403 U.S. at 20. And surely the state's "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent Community School Dist., supra* at 508.[5]

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[5] In effect, Washington argues that placing a peace symbol on an American flag constitutes symbolic "fighting words" which the state may prohibit in the interest of preserving the public peace. E.g., *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). However, the fighting words doctrine of *Chaplinsky* has never been extended to expression which merely shocks or annoys the public generally. Compare, *Chaplinsky* v. *New Hampshire, supra,* with *Cohen* v. *California, supra; Street* v. *New York, infra* and *Terminiello* v. *Chicago,* 337 U.S. 1 (1949).

In *Street* v. *New York*, 394 U.S. 576, 591 (1969), this Court enumerated four interests which would *not* justify the prohibition of speech critical or even contemptuous of the flag:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.

The Washington Court of Appeals, referring to the quoted passage, observed:

> If such interests are insufficient with respect to *words* . . . critical or contemptuous of the flag, they would clearly be insufficient as to *symbols* used conveying the same meaning as the words themselves; and a fortiori they would be insufficient as to symbols respectful of the flag and involving no physical destruction of any part thereof, the flag in conjunction with the peace symbol being used to passively communicate a constitutionally protected message. 5 Wn. App. at 761 (App., *infra*, p. 13a).

Nevertheless, the Washington Supreme Court found a

> recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment . . . . 81 Wn.2d at 799 (App., *infra*, p. 40a).

In explaining its concern for the "preservation of the flag as a symbol of the nation," the court offered three observations: (1) if Appellant's speech were protected, then there could be no restriction of use of the flag for commercial advertising purposes, (2) if Appellant's speech were protected, then the flag could be used to communicate obnoxious political, social, religious and philosophical ideas, and (3) Appellant might, in any event, express his views by other means (App., *infra*, pp. 40a-41a).

The "other means available" rationale was rejected by this Court in *Schneider* v. *State*, 308 U.S. 147, 163 (1939):

> one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

The concern over commercial exploitation of the flag presupposes that the boundaries of protected expression for commercial advertising purposes are coextensive with those of protected political speech, a view which this Court has not taken. See, e.g., *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).[6]

Most significantly, the court's concern that the flag might be used to convey various obnoxious political, social, religious or philosophical messages points plainly to a content-oriented regulation of expression, which is offensive to the First Amendment.[7] See, *Schacht* v. *United States*,

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[6] *Halter* v. *Nebraska*, 205 U.S. 34 (1907), involved a state law against commercial use of the flag. It is not in point here, however, since it was decided before the First Amendment was held applicable to the states in *Gitlow* v. *New York*, 268 U.S. 652 (1925), and no First Amendment issues were considered.

[7] This concern is manifestly futile since, as the court acknowledges, "the statute does not bar the carrying of the American flag

398 U.S. 58, 63 (1970). The court below was clearly contemplating a statute *not* "unrelated to the suppression of free expression," *United States* v. *O'Brien, supra,* when it observed:

> If defendant cannot be constitutionally barred from affixing and displaying what he describes as a peace symbol upon the flag of the United States, neither can he be constitutionally prevented from proclaiming the Ku-Klux Klan upon it, nor the swastika, nor the hammer and sickle, either in advocacy of the Ku-Klux Klan, or Nazism, or Communism, or in opposition to these movements. 81 Wn.2d at 800 (App., *infra,* pp. 40a-41a).

Why, when it comes to the flag, would the Washington court be content to ban all expression rather than to risk exposure to a distasteful message? The words of Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 641-2 (1943), quoted by the Court in *Street* v. *New York, supra* at 593, are, once again, especially apposite:

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization . . . . [F]reedom to differ is not limited to things that do not matter

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in connection with other banners, flags, signs, symbols or devices," 81 Wn.2d at 799, so long as the symbols are not actually combined. Is it less distressing to conceive of the American flag and a swastika-imprinted banner flying side by side at the head of a parade than to conceive of the symbols combined?

much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Suppression of obnoxious political ideas, even where their expression involves use of the American flag, is not a legitimate interest of a government limited by the First Amendment.

2. *The statute under which appellant was convicted is unconstitutionally overbroad and vague, and the appellant has standing to raise such claims.*

A statute is unconstitutionally overbroad if it sweeps within its prohibitions conduct which is protected under the First and Fourteenth Amendments. E.g., *Grayned* v. *City of Rockford, supra,* 33 L. Ed.2d at 231; *Gooding* v. *Wilson,* 405 U.S. 518, 520 (1972); *Zwickler* v. *Koota,* 389 U.S. 241, 249-50 (1967) and cases there cited. Accordingly, if Appellant's activity was protected speech, and if it was prohibited by §9.86.020(2), then the statute is unconstitutionally overbroad.

Additionally, in both the trial[8] and appellate courts below, Appellant cited other examples of protected expression which appear to fall clearly within the prohibitions of the challenged statute. The Washington Supreme Court refused to consider such examples on the ground that "[t]he judicial power to declare a legislative act unconstitutional should not be exercised in hypothetical cases," 81 Wn.2d at

[8] The trial court received in evidence as exhibits 1 and 2 the front page of the Seattle Post-Intelligencer, July 4th, 1970 edition, with the Declaration of Independence superimposed on the flag, and the front page of the Seattle Times of June 14, 1970 with pictures of two men superimposed on the flag above an article entitled "Patriotism: Activist and Hard-Hat."

795, App., *infra*, p. 34a, relying on this Court's decision in *Grayned* v. *City of Rockford*, *supra*. But this reliance was misplaced. In *Grayned*, the appellant did not claim that the application of an ordinance to his activity was invalid, yet this Court explicitly held that "[b]ecause overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge." 31 L. Ed.2d at 231. See also, e.g., *Gooding* v. *Wilson*, *supra*, 405 U.S. at 520-21.

In *Long Island Vietnam Moratorium Committee* v. *Cahn*, *supra*, 437 F.2d 344, the Second Circuit sustained an overbreadth challenge to a statute substantially like the one here at issue. The court, through Chief Judge Lumbard, observed that the New York statute:

> prohibits in clear language a myriad of uses of the flag, including not only the displaying of the emblems which plaintiffs have been distributing, but also the displaying of flags or flag-type buttons with patriotic slogans or pictures on them. It prohibits on its face all kinds of posters, buttons, symbols, slogans and emblems such as have been used for many years in election campaigns, patriotic movements, and so forth. *Id.* at 348.

The Second Circuit also held the statute unconstitutionally vague, finding the statutory language so broad that its meaning was uncertain and thus gave law enforcement officers "too much arbitrary discretion in determining whether or not a certain emblem is grounds for prosecution." 437 F.2d at 350.[9] In *Goguen* v. *Smith*, *supra*, the

[9] The Washington statute, like the one which the Second Circuit struck down, has reference not only to the traditional cloth flag of the United States, but to "any flag, standard, color, ensign or

First Circuit employed similar vagueness and overbreadth considerations to void the Massachusetts statute which made it a crime to "publicly treat contemptuously the flag of the United States."

The ruling below conflicts with these decisions and cannot withstand scrutiny under the analysis they employ.

Finally, the reach of the improper use statute is further broadened because, as construed by the Washington Supreme Court, it dispenses with the element of criminal intent. 81 Wn.2d at 792-93 (App., *infra*, pp. 31a-32a). By contrast, under Washington's flag *desecration* statute, §9.86.030, "intent to desecrate . . . must be established." *Ibid.* See, *State* v. *Turner*, 78 Wn.2d 276, 474 P.2d 91 (1970). Nevertheless, the court below held that the Appellant could be convicted under the flag use statute without any proof of *mens rea*.

This decision conflicts with rulings of this Court which have insisted upon criminal intent as a limiting principle on legislation that impinges on First Amendment rights.

A requirement of *mens rea* is the rule, rather than the exception in criminal law. See, *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Dennis* v. *United States*, 341 U.S. 494, 500 (1951). And while this Court has not articulated a general doctrine of *mens rea*, see *Powell* v. *Texas*, 392 U.S. 514, 535 (1968), in many cases involving governmental regulation infringing on the First Amendment, the Court has required some form of intent, scienter or malice. See

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shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof." Revised Code of Washington §9.86.010.

generally, *Packer, Mens Rea and the Supreme Court,* 1962 The Supreme Court Review, 107, 125-27. Thus, for example, in *Scales* v. *United States,* 367 U.S. 203 (1961), the Court decided that in order to convict an individual under the membership clause of the Smith Act, a showing of active participation in the organization with knowledge of and specific intent to bring about its illegal objectives was necessary. See also, *Yates* v. *United States,* 354 U.S. 298 (1957); *Dennis* v. *United States,* 341 U.S. 494, 499, 500 (1951); *Watkins* v. *United States,* 354 U.S. 178 (1957). Similarly, a showing of criminal intent is constitutionally required in a prosecution under an obscenity law. *Smith* v. *California, supra; Mishkin* v. *New York,* 383 U.S. 502 (1966). Finally, similar requirements limit the imposition of non-criminal sanctions on protected First Amendment activity. See, e.g., *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-80 (1964) (libel); *Wieman* v. *Updegraff,* 344 U.S. 183, 191 (1952) (inquiry into political beliefs).

In sum, whether or not a showing of *mens rea* is constitutionally compelled in all prosecutions, it should certainly be imposed as a requirement of statutes regulating First Amendment activity. The refusal of the court below to do so provides an additional reason for this Court to note jurisdiction.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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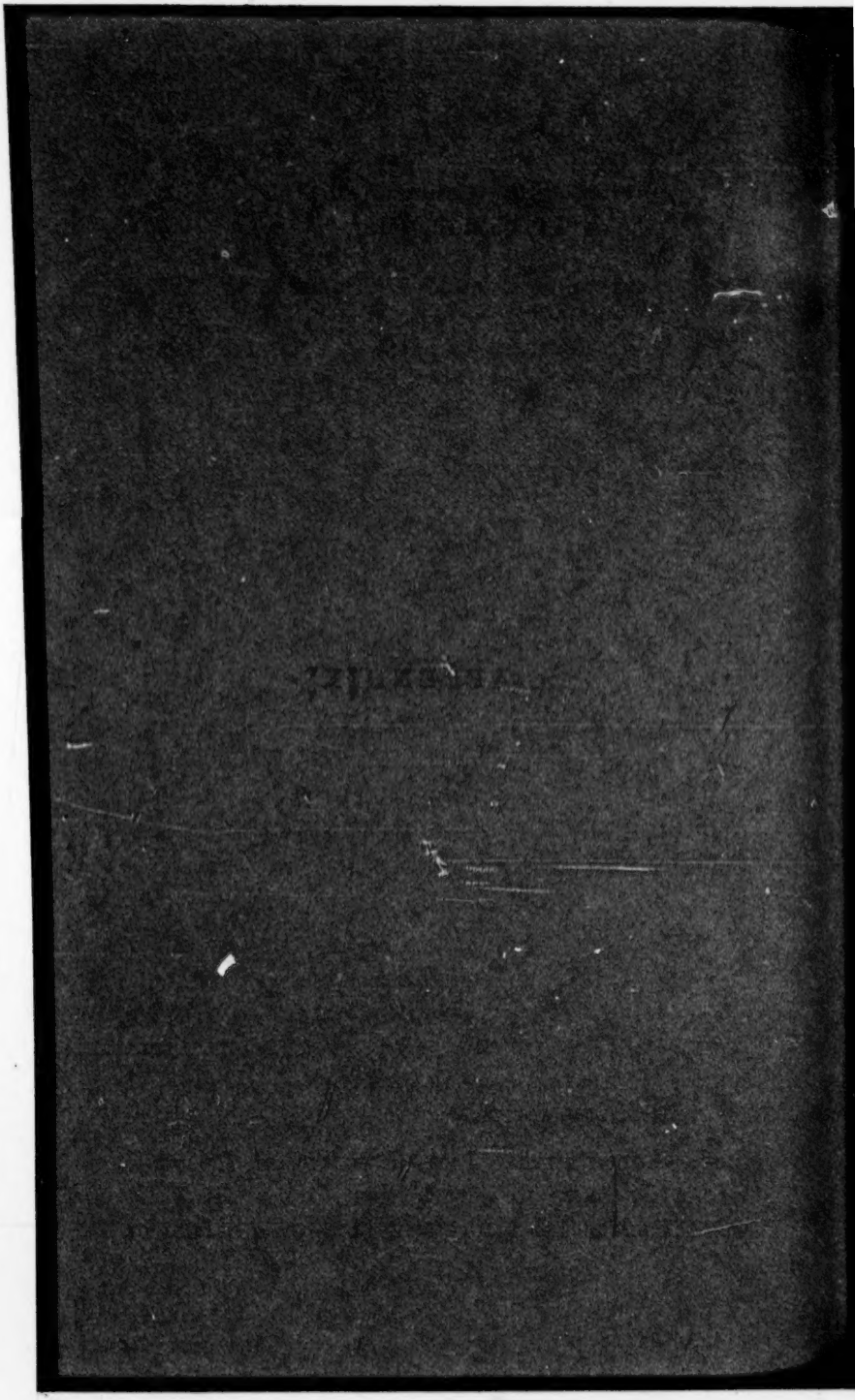
APPENDIX



Opinion of the Court of Appeals of Washington

[No. 854-1. Division One—Panel 1. November 15, 1971.]

THE STATE OF WASHINGTON, *Respondent*, v. HAROLD OMAND SPENCE, *Appellant*.

[1] Criminal Law—Appeal and Error—Review—Specific Crime Charged. Under the sixth amendment to the United States Constitution and Const. art. 1, § 22 (amendment 10) an appellate court must confine its review of the conviction appealed from to the violation actually charged.

[2] Flags—Use and Display—Criminal Prosecutions—Review. When a defendant is charged with violating RCW 9.86.020(1) and (2) and 9.86.010 dealing with improper flag use, and not charged with RCW 9.86.030 as amended which has heretofore been construed to include flag desecration, an appellate court must confine its review to the violation actually charged.

[3] Flags—Constitutional Law—Freedom of Speech—Flag Symbolism. The use of the United States flag or a representation thereof as a symbol of ideas is subject to the proper exercise of the state's police power to the extent that such regulation does not become a constitutionally impermissible restriction of the right of free speech.

[4] Flags—Constitutional Law—Freedom of Speech—Words Offensive to Sensibilities. Under the First Amendment as heretofore construed, even defiant or

contemptuous words spoken of the flag are protected free speech, and the fact that the words are offensive to the sensibilities of the average citizen is not the controlling test of whether the words are constitutionally protected free speech.

[5] Flags—Constitutional Law—Freedom of Speech—Symbolic Speech—In General. Thoughts and ideas, when conveyed by nonspeech symbols, constitute symbolic speech and are protected by the First Amendment. These include symbols not charged to have been used to show disrespect for the flag or used for the purpose of defiling or desecrating the flag and involving no physical destruction of any part thereof.

[6] Constitutional Law—Freedom of Speech—Conflict With Governmental Interests—Balancing. There must be an evaluation and balancing of competing interests when governmental and societal interests conflict with the constitutional right of free speech. Before a state's police power may be deemed to override the First Amendment there must be a state interest to be protected unrelated to the suppression of free expression, and the statutory restriction must be no greater than is essential to the furtherance of that interest. A restriction so broad that it strikes where no interest is served other than the proscription of expression is constitutionally impermissible.

[7] Flags—Constitutional Law—Freedom of Speech—Conflict With Governmental Interests—Flag Use. Under the First Amendment, the statutory prohibition of the act of affixing a symbol to the American flag and displaying the flag with the symbol so affixed

is not constitutionally permissible when the scope of the prohibition is not limited to protecting proper societal or governmental interests. To the extent that the prohibition is not so limited, the statute violates the constitutional principle that the statutory restriction must be one unrelated to the suppression of free expression and not broader than essential to the furtherance of that interest. Accordingly, the suppression of free expression of ideas by means of a symbol affixed to the national flag, involving neither desecretion nor destruction thereof, violates the First Amendment in the absence of narrowly drawn restrictions no broader than essential to the furtherance of governmental or societal interests the nature of which has been in part heretofore judicially determined.

[8] Flags—Constitutional Law—Freedom of Speech—Symbolic Speech—Attachment to Flag—Effect. A physical symbol which would be protected symbolic speech when displayed away from the flag even though in closest proximity thereto does not lose its constitutional protection solely because it is placed on the flag displayed.

[9] Flags—Statutes—Validity—Constitutionality—Overbreadth—What Constitutes. A statute relating to flag use is constitutionally overbroad if, while serving valid governmental or societal interests, it speaks in such broad terms as to impair, prohibit, or have a chilling effect upon the exercise of otherwise permissible free expression. Nothing in the doctrine of overbreadth derogates from the view that the American flag is entitled to our affection and respect.

[10] Statutes—Validity—Constitutionality—First Amendment Rights—Burden of Proof. When the issue is whether a statute violates the First Amendment there is no presumption that the statute attacked is constitutional and the state has a heavy burden to demonstrate that the limitation challenged is constitutionally permissible.

[11] Statutes—Validity—Constitutionality—First Amendment Rights—Standing to Challenge. Ordinarily one charged with violating a criminal statute has no standing to challenge the validity of the statute on account of overbreadth if he is not the victim of overbreadth. In a First Amendment case, however, he may rely on overbreadth on the face of the statute even if he thereby asserts that doctrine as to others and is not himself the victim of the overbreadth.

[12] Flags—Use and Display—Statutory Provisions—Validity. RCW 9.86.020(1) and (2), taken in conjunction with RCW 9.86.010 which forbids certain exhibition or display of the state or federal flag or representations thereof, are invalid as unconstitutionally overbroad.

WILLIAMS, J., dissents by separate opinion.

Appeal from a judgment of the Superior Court for King County, No. 54474, Charles R. Denny, J. Pro Tempore, entered October 29, 1970. *Reversed.*

Prosecution for improper display of the flag. Defendant appeals from a conviction and sentence.

David Allen, for appellant.

Christopher T. Bayley, Prosecuting Attorney, and *James E. Warme, Deputy*, for respondent.

HOROWITZ, C.J.—Defendant, after jury trial, was convicted of violating RCW 9.86.020(1) and (2), which forbids the improper use for exhibition or display of any flag of the United States as therein defined. On appeal he contends his conviction should be reversed and the charge dismissed because the statute violates his First Amendment rights. For the reasons next stated, we uphold his contention.

RCW 9.86.020(1) and (2) provide:

> No person shall, in any manner, for exhibition or display:
>
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement.

RCW 9.86.010 defines the word flag as follows:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

The facts are these: Defendant, by the use of removable plastic tape, superimposed a peace symbol upon an American flag in his possession. He then displayed the flag containing the peace symbol to public view by hanging it out of his apartment window in Seattle, Washington, in an upside-down position. The plastic tape peace symbol consists of black lines forming a circle, which in turn contains black straight lines in much the form of an inverted trident. Defendant testified that his purpose in placing the peace symbol upon the flag displayed was to associate the flag with peace instead of war and violence, and to serve as a protest to the invasion of Cambodia and the killings at Kent State University, both of which events had occurred a few days before. He testified that he did not know that placing the plastic tape peace symbol upon the flag was against the law.

[1, 2] The state does not contend the information charged defendant with desecrating the flag—flag desecration being prohibited by RCW 9.86.030 as amended. Had flag desecration been the intended charge, it would have been necessary to include an allegation, in substance or effect, that defendant had committed "acts . . . done knowingly and intentionally with an intent or purpose of defiling and desecrating [the flag] or holding it publicly up to contempt." *State v. Turner*, 78 W.D.2d 276, 280, 474 P.2d 91 (1970). It is not claimed that such an intent was alleged in the information, nor is such intent relied upon to uphold the conviction below under RCW 9.86.020. Indeed, the state successfully contended below that intent to violate the statute under which the information was drawn was an unnecessary ingredient of the offense charged. We therefore confine ourselves, as we must, to a consideration of the actual charge on which defendant was convicted. U.S. Const.,

amend. 6; Const. art. 1, § 22 (amendment 10). As stated in *State v. Frazier*, 76 Wn.2d 373, 456 P.2d 352 (1969), at 376: "He cannot be accused of one crime and convicted of another."

[3] A flag may be considered from two aspects: (1) as a physical object, and (2) as a symbol of ideas. As a physical object, its ownership is subject to the proper exercise of the state's police power (*see* Cross, *The Diminishing Fee*, 20 Law & Contemp. Prob. 517 (1955), cited in *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wn. App. 833, 847 n.6, 478 P.2d 792 (1970)), and such ownership is protected by the Fifth and Fourteenth Amendments implemented, for example, by laws relating to trespass. As a symbol, its regulation is also subject to the proper exercise of the state's police power, but the use of the symbol is protectable, if at all, by the First and Fourteenth Amendments which provide a restraint upon the exercise of police power. *See Halter v. Nebraska*, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907); *State v. Oyen*, 78 W.D.2d 934, 937, 480 P.2d 766 (1971); Annot., 22 L. Ed. 2d 972 (1970).

The basic question here involves a determination of whether the constitutional right of free speech (U.S. Const. amend. 1; Const. art. 1, § 5;[1] *Adams v. Hinkle*, 51 Wn.2d 763, 322 P.2d 844 (1958)) is violated by RCW 9.86.020(1) and (2) enacted under the state's police power, either as that statute is applied to defendant or on account of overbreadth.

Flags have a long and worldwide history. 9 Encyclopedia Britannica 398, *Flags* (22d ed. 1970); E.M.C. Barraclough,

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[1] Because the First Amendment provides an adequate basis for the disposition of the question involved, it is unnecessary to determine whether article 1, section 5 compels a like conclusion. Reference to the American flag applies by a parity of reasoning to the state flag.

Flags of the World (Rev. ed. 1965); Quaife, The Flag of the United States (1942). They serve a variety of functions. Thus, they may be used as a reminder of an historic past, a mirror of a peaceful or turbulent present, and a promise of conditions hoped for or of events to come. The American flag is similarly used. The American flag, however, has its own communicating function. Its content finds expression and use based on American experience, American values and American outlook. The flag does not bear a single message, orthodox or unorthodox; nor is it the sole preserve of government or the sole preserve of any one person, group or interest. It does not serve to freeze past or existing institutions or past or existing points of view. Born out of the vicissitudes of change, and itself a striking and eloquent manifestation of that change, it would be strange indeed if it proved inhospitable to the constitutionally protected appeal for change by lawful means. Hence, the flag is both an appeal for loyalty to existing America, its policies and its ideals, and an invitation for peaceful change to bring America closer to heart's desire. In short, the American flag is an identifying, history-preserving and ideological symbol. As stated in *Parker v. Morgan*, 322 F. Supp. 585 (W.D. N.C. 1971), at 588:

> If the flag says anything at all, and we agree it often may in a given context, we think it says everything and is big enough to symbolize the variant viewpoints of a Dr. Spock and a General Westmoreland. With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it.
>
> . . . Sometimes the flag represents government. . . . Always it represents America—in all its marvelous diversity.

It is understandable that a concern for the preservation of the flag's symbolism should find expression, all over the land and in a variety of contexts, in federal and state statutes designed to protect the American flag and representations of that flag against both misuse and disrespect. *See e.g.,* 4 U.S.C.A. §§ 1-3; 36 U.S.C.A. §§ 172-178, 182; RCW 9.86.010-.070 (Uniform Flag Law); RCW 9.05.100-.140. Indeed, a body of law—albeit somewhat small—has developed with respect to how statutory enactments dealing with the flag should be regarded. *See generally,* 35 Am. Jur. 2d, *Flags* §§ 1-5 (1967, Supp. 1971); 36A. C.J.S., *Flags* §§ 1-6 (1967, Supp. 1971); Annot., 22 L. Ed. 2d 972 (1970); Note, *Exploiting the American Flag: Can the Law Distinguish Criminal from Patriot?,* 30 Maryland L. Rev. 332 (1970).

[4, 5] From the case law it is clear that even defiant or contemptuous words spoken of the flag are protected free speech; and the fact that the words would be offensive to the sensibilities of the average citizen is not a controlling consideration. *Street v. New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969). Thought and ideas, however, may be conveyed by nonspeech symbols as well as by words. Such symbols when so used constitute symbolic speech which is protected by the First Amendment. *Tinker v. Des Moines School Dist.,* 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). Furthermore, a statute mandating respect for the flag, as in the case of a compulsory flag salute, is a violation of the First Amendment. *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 A.L.R. 674 (1943). Even the display of an alien red flag symbolizing opposition to the American government is constitutionally protected free speech.

Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484 (1930).

It might be suggested that the state has the right to regulate the nonspeech aspects of conduct as long as the regulation does not impair or regulate speech itself. *Cf., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 93 L. Ed. 834, 69 S. Ct. 684 (1949); *Adderley* v. *Florida*, 385 U.S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242 (1966). This view is the rationale, for example, of the majority opinion in *People v. Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), affirmed per curiam by an equally divided court, 402 U.S. 989, 28 L. Ed. 2d 287, 91 S. Ct. 1217 (1971). Whatever workability this rule may possess in the presence of actual speech, the rule may well be unworkable in the presence of conduct which itself is constitutionally protected symbolic speech and is nonseverable therefrom. Thus, the wearing by high school students of black armbands to protest American policy in Vietnam is conduct and is nonseverable from the symbolic speech exemplified by the armbands (*Tinker v. Des Moines School Dist., supra*); and a compulsory flag salute statute which regulates or mandates conduct also runs afoul of constitutional provisions which prevent government from prescribing what is "orthodox in politics, nationalism, religion, or other matters of opinion . . ." *West Virginia State Bd. of Educ. v. Barnette, supra*, Mr. Justice Jackson at page 642. *See also Stromberg v. California, supra*, and *Gregory v. Chicago*, 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969).

[6] It has also been pointed out that the constitutional right of free speech is not absolute and does not automatically and mechanically prevail against statutes protecting legitimate governmental interests by prohibition or regulation of designated conduct with respect to the flag. Thus, a

statute may prohibit the use of a flag for commercial advertising purposes (*see Halter v. Nebraska, supra*); or a statute may protect the dignity of a foreign flag pursuant to an obligation imposed by international law (1 L. Oppenheim, International Law § 121 (7th ed. 1948); 2 G. Hackworth, Digest of International Law § 127 (1941); G. Wilson, *Respect for National Flag*, 29 Am. J. of Int'l Law 662 (1935)); or a statute may protect the flag if so to do protects the safety of the state against a clear and present danger. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); *Schenck v. United States*, 249 U.S. 47, 63 L. Ed. 470, 39 S. Ct. 247 (1919); *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 239 P.2d 545 (1952). It is conceivable, although we do not determine the matter, that a statute may properly seek to preserve a privately owned flag of historic importance; or a statute may protect the identifying function of the flag at home and abroad against substantial impairment; or a statute may regulate the form of a military salute in America's armed forces. Furthermore, it may be assumed that a statute may properly protect the encouragement of love of country. *See Halter v. Nebraska, supra.* These are independent and protectable governmental interests.

The problem of reconciling protection of legitimate governmental interests with the demands of free speech calls for an evaluation of competing interests and the striking of a balance that will mark the boundaries between what is constitutionally permissible and what is constitutionally impermissible. *See State v. Oyen*, 78 W.D.2d 934, 943-44, 480 P.2d 766 (1971). The doctrine of balancing was articulated in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), a draft card burning case. *O'Brien* held that before a state's police power would be

deemed to override the First Amendment there would have to be a state interest to be protected "unrelated to the suppression of free expression," and the statutory restriction would have to be "no greater than is essential to the furtherance of that interest." 391 U.S. at 377. The statute may not be "so broad that it strikes where no interest is served other than the proscription of expression." *Hodsdon v. Buckson*, 310 F. Supp. 528, 534 (Del. 1970).

[7] In our opinion the statutory prohibition of the act of affixing a peace symbol to the American flag and displaying the flag with the peace symbol so affixed from a window is not constitutionally permissible as protection of a societal or governmental interest "unrelated to the suppression of free expression" as required by *O'Brien*. The prohibition of defendant's conduct does not fall within the class of any of the constitutionally permissible prohibitions already discussed, nor are the possible societal interests listed by Mr. Justice Harlan in *Street v. New York, supra*, available as justification for the statutory prohibition concerning the flag use involved here. The interests held insufficient to justify the prohibition of words critical or even contemptuous of the flag are discussed as follows by Mr. Justice Harlan in *Street v. New York, supra*:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passersby who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words

upon others, showed proper respect for our national emblem.

394 U.S. at 591. If such interests are insufficient with respect to *words* considered in *Street v. New York, supra,* critical or contemptuous of the flag, they would clearly be insufficient as to *symbols* used conveying the same meaning as the words themselves; and a fortiori they would be insufficient as to symbols respectful of the flag and involving no physical destruction of any part thereof, the flag in conjunction with the peace symbol being used to passively communicate a constitutionally protected message. To prohibit defendant's conduct in the instant case when such conduct is nonseverable from a constitutionally protected message may in effect constitute a prohibition of free speech itself, and thus be violative of the First Amendment as construed in *United States v. O'Brien, supra.*

[8] The next question presented, therefore, is whether a peace symbol, which would be protected symbolic speech if used away from the flag (*see Street v. New York, supra; Stromberg v. California, supra; Tinker v. Des Moines School Dist., supra; West Virginia State Bd. of Educ. v. Barnette, supra*), has no such special constitutional protection when the peace symbol is placed upon the flag itself. If the flag mirrors American experience, past and present; and if respect for the flag cannot constitutionally be compelled by a mandatory flag salute; and if symbolic opposition to the flag cannot be prohibited; and if symbolic as well as actual speech is entitled to constitutional protection; and if the suppression of free expression cannot be upheld in the absence of an independent governmental interest to be protected, unrelated to the suppression of free expression and not broader than is necessary for that pur-

pose; and if offense to the sensibilities of the average citizen is not enough to condemn the exercise of free speech—can it be said to really matter, on a balancing of interests, whether the words or symbols are used away from the flag or representations thereof even though in closest proximity thereto, or whether such words or symbols are used on the flag itself. The case nearest in point on this issue—apart from flag desecration cases involving the flag itself already cited—the rationale of which is applicable here, is *Long Island Vietnam Moratorium Comm. v. Cahn,* 437 F.2d 344 (2d Cir. 1970). That case, in a unanimous opinion by Chief Judge Lumbard, held that a peace symbol placed on a representation of the American flag was protected symbolic speech and that the New York Flag Use Statute (General Business Law of New York § 136(a), substantially identical with RCW 9.86.020(1) and (2)) violated the First Amendment because overbroad, vague and permitting selective enforcement of "only that expression which local officials will tolerate." 437 F.2d at 350. The court could see no difference in principle between its case and the words in *Street v. New York, supra.* Neither can we.

The doctrine of *Long Island Vietnam Moratorium Comm. v. Cahn, supra,* is necessarily supported by recent federal cases involving the flag itself that have invalidated flag desecration statutes as violative of the First Amendment because of overbreadth and vagueness. *Parker v. Morgan,* 322 F. Supp. 585 (W.D. N.C. 1971); *Hodsdon v. Buckson, supra; Crosson v. Silver,* 319 F. Supp. 1084 (Ariz. 1970). The case law on the validity of flag desecration statutes is not unanimous, however. *See inter alia State v. Turner,* 78 W.D.2d 276, 474 P.2d 91 (1970), in which the validity of former RCW 9.86.030 is assumed; *Sutherland v. DeWulf,* 323 F. Supp. 740 (S.D. Ill. 1971); *People v. Radich, supra;*

Hoffman v. United States, 256 A.2d 567 (D.C. Ct. App. 1969); *Joyce v. United States,* ..... F.2d ..... (D.C. Cir., 1971), slip opinion, October 26, 1971. The instant case does not involve flag desecration and we need not determine whether the conclusion reached here concerning improper flag use likewise applies to flag desecration.

[9] It should be noted that the decisions invalidating flag-desecration statutes or improper-use statutes do not hold that a flag-use statute or a flag-desecration statute cannot under any circumstances be enacted. We have already pointed out that a state may protect a governmental interest under the limitations recognized in *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). The statute, however, cannot speak in such broad terms as to impair, prohibit or have a chilling effect upon the exercise of constitutionally protected rights of free speech. As stated in *NAACP v. Button,* 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963), "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms" (371 U.S. at 438) because these freedoms need "breathing space to survive" (371 U.S. at 433).

[10, 11] When the issue is whether a statute violates the First Amendment, it was recognized in *Adams v. Hinkle,* 51 Wn.2d 763, 322 P.2d 844 (1958), following the federal rule, that there is no presumption that the statute attacked is constitutional and that " 'the State has a heavy burden to demonstrate that the limitation challenged . . .' " is constitutionally valid. 51 Wn.2d at 769. Furthermore, a defendant charged with violating a statute ordinarily has no standing to assert the doctrine of overbreadth if he is not its victim (*State v. Cashaw,* 4 Wn. App. 243, 480 P.2d 528 (1971)); yet in a First Amendment case he does have stand-

ing to rely upon overbreadth on the face of the statute in either federal or state courts even if he thereby asserts overbreadth as to others. *United States* v. *Raines*, 362 U.S. 17, 21-22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 84 L. Ed. 1093, 60 S. Ct. 736 (1940); *Fort v. Civil Service Comm'n*, 61 Cal. 2d 331, 392 P.2d 385, 389-90, 38 Cal. Rptr. 625, 630 (1964); *In re Davis*, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702, 716-17 (1966); 2 C. Antieau, Modern Constitutional Law § 15.23 (1969).

Should overbreadth exist the statute itself may be invalidated, or the overbroad application of the statute to the defendant will be negated. As stated in *NAACP v. Button*, *supra* at 432:

> [I]n appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

Such an approach lessens the danger of tolerating "a penal statute susceptible of sweeping improper application." *NAACP v. Button*, *supra* at 432-33. *See generally*, R. Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599 (1962); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Note, *Exploring the American Flag: Can the Law Distinguish Criminal From Patriot?*, 30 Maryland L. Rev. 332 (1970).

[12] The instant case illustrates overbreadth on the face of RCW 9.86.020(1) and (2), not only with respect to the American flag itself, but also with respect to the items

included in the statutory definition of the flag. RCW 9.86.010 makes it plain that the statutory prohibition is not limited to the flag itself. It also extends to any "flag, standard, color, ensign or shield, . . . or copy, picture, or representation thereof . . . of any size, evidently purporting to be such . . . of the United States or of this state . . ." We need only consider the application of the statute to a representation of the flag, as distinguished from other items included in the flag definition, to make the point of overbreadth and illustrate its consequences. Thus it is arguable, although we need not determine the matter, that the definition, when read in conjunction with RCW 9.86.020, would have prohibited both the use of a picture of the flag over the words as was done by the Seattle Post-Intelligencer in its July 4, 1970 edition (Seattle Post-Intelligencer, July 4, 1970 at page 1), and the publication by the Seattle Times of a picture of the American flag on which a person's picture might be said to have been superimposed (Seattle Times, June 14, 1970 § A, page 1). (Appellant's exhibits 1 and 2.) Patriotic, public-spirited or ideological slogans such as "love America," "liberty," "brotherhood," "to our honored dead," or even "July 4, 1776," if placed upon a picture of the flag, would be illegal. It would also be illegal to continue the long practice of using the flag or its representation in conjunction with the symbols prohibited by the statute notwithstanding the fact that this practice has been a traditional mode of free expression commonly used by both major and minor political parties throughout our history.

It would be irresponsible to suggest that the common use of flag representations to provide ideological emphasis or support for words or symbols considered public-spirited or patriotic, or in the course of political campaigns, proceeds

upon any assumption other than the assumption that the use is entirely lawful and, to the more sophisticated at least, that such use is protected free speech. It must be remembered, however, that the right of free speech, symbolic or actual, is not limited to a message orthodox and uncontroversial, nor is it limited to words or symbols that would not affront the average citizen's sensibilities in the absence of a protectable governmental interest requiring otherwise. *See e.g., Street v. New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969); *United States v. O'Brien, supra; West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 A.L.R. 674 (1943). It is not suggested that the constitutionality of a statute be determined by the logical application of a widely held public opinion. This is because wishes expressing strongly held values and constitutional text may differ. Should such a difference exist, it would be our duty to follow the text. Yet if the text speaks in general terms requiring implementing definition by the court, such implementing definition must be a rational and reasonable one. Should the implementing definition be in conformity with the logical implications of publicly held values, the rational character of the implementing definition would be supported by that fact. We think that support exists here.

This being a First Amendment case, the defendant, even though not the victim of the overbreadth described in *Long Island Vietnam Moratorium Comm. v. Cahn, supra,* with respect to flag representations, nevertheless has standing to take advantage of the overbreadth doctrine. *See United States* v. *Raines, supra; Dombrowski v. Pfister, supra; Thornhill v. Alabama, supra; Fort v. Civil Serv. Comm'n, supra; In re Davis, supra.* We conclude that RCW 9.86.020

(1) and (2) is invalid as unconstitutionally overbroad on its face.

In so concluding, we recognize that the problem here with respect to which we have both power and duty is only to determine whether the defendant had the constitutional right to do what he did. We judicially know that the exercise of the right of free speech often has emotional overtones. At one extreme such an exercise is regarded as a raw and irrational contest between government on the one hand and an irresponsible individual on the other. To others the exercise of the right of free speech is but the assertion of what the literal meaning of the First Amendment permits. The doctrines of symbolic speech and overbreadth as developed by the courts adopt neither extreme and seek to give effect both to the proper societal interest of the state and nation without rejecting the proper free speech demands of the individual. Under that doctrine, the American flag continues to be entitled to our affection and respect as described in *Halter v. Nebraska*, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907). *Halter*, however, no more controls our decision in this case than does the latest case dealing with flag desecration which requires intent to desecrate as distinguished from flag use, which does not. *Joyce v. United States, supra; State v. Turner*, 78 W.D.2d 276, 474 P.2d 91 (1970). *Halter* was concerned with a portion of the Nebraska flag statute similar to RCW 9.86.020(3), not (1) or (2). It dealt with the validity of a statute forbidding the exploitation of the American flag in the sale of a product, namely, exploitation in the form of a representation of the American flag imprinted on a bottle of beer for purposes of advertisement. *Halter* had no occasion to discuss either the First Amendment, symbolic speech, or the doctrine of overbreadth—and did not do so. *See generally*, 16 Am. Jur. 2d,

Constitutional Law § 348 (1964). What we do here is merely to give proper weight to cases, including those referred to in this opinion, decided subsequent to *Halter* that, without departing from *Halter*, have developed the doctrine of symbolic speech in light of the doctrine of overbreadth.

In our opinion, RCW 9.86.020(1) and (2) would not violate the First Amendment if more narrowly drafted to protect a proper governmental interest as described in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Although we express no opinion on the text of a proposed narrower draft of a flag desecration statute such as RCW 9.86.030 as amended, not here charged to have been violated by defendant, a suggested statute setting forth what its author contends is a protectable governmental interest is contained in Note, *Flag Desecration: Illegal Conduct or Protected Expression?*, 22 Case Western Reserve L. Rev. 555, 573 (1971). *See* Note, *Less Drastic Means and the First Amendment*, 78 Yale L. J. 464 (1969).

The judgment is reversed with directions to dismiss the charge.

UTTER, J., concurs.

WILLIAMS, J. (dissenting)—The principal question in this case simply stated is: Does the interest of the citizens of the state of Washington in the preservation of the integrity of the American flag transcend the desire of appellant to publicly proclaim his political views by the use of that flag as a backdrop or billboard? I believe the essential purpose of the flag should be preserved and that our state government has properly prohibited the use which appellant would make of it.

In essence, appellant's argument is that he has a right protected by the First Amendment to employ the American

flag to express and convey his ideas and to make alterations to the flag best suited to his purposes. There is no doubt that an American flag so employed will attract attention and that a message placed thereon either in words or by symbol will be broadcast.

Freedom of speech is not beyond all control. A state interest and the general good may take precedence over the exercise of unfettered personal liberty. The test for determining whether a public interest is superior to the individual's exercise of free speech is stated in *United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968) as follows:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The statute in question is well within the requirements of these criteria.

The United States Supreme Court in *Halter v. Nebraska*, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907), decided that a state may prevent the misuse of the American flag, not only to prevent breaches of the peace generated thereby, but also because

> [i]t is not extravagant to say that to all lovers of the country it [the flag] signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong;

> security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected.

Should the law be, as contended by appellant, that each citizen under the guise of "symbolic speech," is free to mutilate or disfigure the flag to express his ideas, good or bad, then the essential purpose of the flag, which Woodrow Wilson called "the emblem of our unity, our power, our thought, and our purpose as a nation," will be destroyed. M. Krythe, What So Proudly We Hail 26 (1968). The interest of every citizen as well as that of the state of Washington in the preservation of the flag, unmarked and unsullied, overrides appellant's privilege of citizenship and his personal liberty merely to the extent that he must find some other means, of which many are available, to express his ideas. *See Joyce v. United States,* —— F.2d —— (D.C. Cir. 1971), slip opinion, October 26, 1971; *People v. Radich,* 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), *aff'g by an equally divided court,* 400 U.S. 864, 28 L. Ed. 2d 287, 91 S. Ct. 1217 (1971).

Our Supreme Court in *State v. Oyen,* 78 W.D.2d 934, 943, 480 P.2d 766 (1971) had this to say:

In applying the concept in situations where freedom of speech may be concerned, it is essential to bear in mind that an otherwise valid statute, which, in protecting important societal interests, makes a particular course of conduct illegal, does not run afoul of the constitution merely because the right of free speech may be intermingled with the condemned conduct. *Cox v. Louisiana, supra,* [379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965)]; *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968); *Cameron v. Johnson,* 390 U.S. 611, 20 L. Ed. 2d 182, 88 S. Ct. 1335 (1968); *Adderley v. Florida,* 385 U.S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242 (1966); *Kovacs v. Cooper,* 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949).

In such situations, however, it is incumbent upon the court to weigh the purported impairment of speech engendered by the statutory provision against the importance of the societal interest sought to be vindicated by the statute, as well as the nature and extent of the threat which the statutorily forbidden conduct poses to that interest. And, too, the alternatives available to the state and the claimant must be evaluated, *i.e.,* whether the state may achieve its ends in a less restrictive manner and/or the claimant effect his communication in a way less detrimental to the societal interest.

As seen, the statute protects an important societal interest, whereas appellant has suffered a very slight impairment of his method of expression and no strictures on speaking, writing, or conveying his ideas by any other means. *Oyen* is a much more provocative case than the one presented here, because the defendants in *Oyen* were arrested for engaging in pamphleteering, one of the truly

historical methods of public dissemination of political views. The Supreme Court applying the test above set out held that even though the pamphleteering was conducted on a walkway outside of school buildings, it must yield to the interest of the state in maintaining a scholastic atmosphere for students of the school.

As to appellant's contention that the statute does not meet the constitutional test of due process because it is vague, I believe that it is sufficiently definite to inform a person with reasonable precision what acts are prohibited, so that he may have a certain, understandable rule of conduct and know what acts he must avoid. *State v. Oyen, supra.*

It is of no importance that appellant was arrested for violation of a flag misuse law rather than one for desecration containing an element of contemptuous intent because the power of the state to further the peoples' interest by protecting the flag may be exercised irrespective of evil or malice. *State v. Turner,* 78 W.D.2d 276, 474 P.2d 91 (1970). The statute with which we are concerned has for its purpose the preservation of unmarked national and state symbols. The prohibition is against all disfigurement, no matter how noble the thought behind it.

Freedom of speech does not, in my view, include freedom to publicly use the American flag in the manner employed by appellant, in the face of an acknowledged societal interest in the flag. Although it may be important to appellant to express his views in this novel way, he should remember that the United States, as symbolized by the American flag, is important too.

The judgment should be affirmed.

Opinion of the Supreme Court of Washington

[No. 42256. En Banc. Jan 18 1973]

THE STATE OF WASHINGTON, *Appellant*, v. HAROLD OMAND SPENCE, *Respondent*.

[1] Criminal Law—Defenses—Ignorance of Law. Absent insanity, all persons are presumed to know the law and are held responsible for their free and voluntary acts and deeds.

[2] Flags—Use and Display—Addition of Design—Elements of Crime—Intent. RCW 9.86.020, which prohibits the placing of any design or symbol upon the flag of the United States, or the displaying of a flag so marked, defines an offense which is malum prohibitum and which requires no proof of evil intent or motive but only a voluntary and knowing act in order to constitute a violation of the statute.

[3] Statutes—Validity—Standing to Challenge—Constitutionality. A party may not urge the unconstitutionality of a statute unless he has been adversely affected by the features of the statute about which he makes his complaint.

[4] Criminal Law—Statutes—Validity—Challenge in the Abstract. Judicial power should not be exercised in hypothetical cases to declare a legislative act unconstitutional.

[5] Criminal Law — Statutes — Certainty — Standard of Guilt. A criminal statute which leaves the standard of

guilt to the variant views of the different courts and juries which may be called upon to enforce it is unconstitutionally vague.

[6] Flags—Constitutional Law—Freedom of Speech—Symbolic Speech—Addition of Design. RCW 9.86.020, which prohibits the placing of any design or symbol upon the flag of the United States, or the displaying of a flag so marked, does constitute a limitation on speech, symbolic or otherwise, and is both precise in its terms and its breadth and is constitutional.

[7] Flags—Use and Display—Statutory Provisions—Validity. A nation has a right to adopt a national emblem and the member states have a right to adopt statutes regulating its use and protecting it from abuse and misuse.

Stafford and Hamilton, JJ., concur by separate opinion; Finley, J., dissents by separate opinion; Utter and Brachtenbach, JJ., did not participate in the disposition of this case.

Appeal from a decision of the Court of Appeals, November 15, 1971, 5 Wn. App. 752. *Reversed.*

The Court of Appeals reversed a judgment of the Superior Court for King County, No. 54474, Charles R. Denney, J. Pro Tempore, entered October 29, 1970. Respondent (prosecution) appealed to the Supreme Court.

Prosecution for improper display of the flag. Defendant appealed to the Court of Appeals from a conviction and sentence.

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 42256

EN BANC

Filed Jan 18 1973

THE STATE OF WASHINGTON,

Appellant,

v.

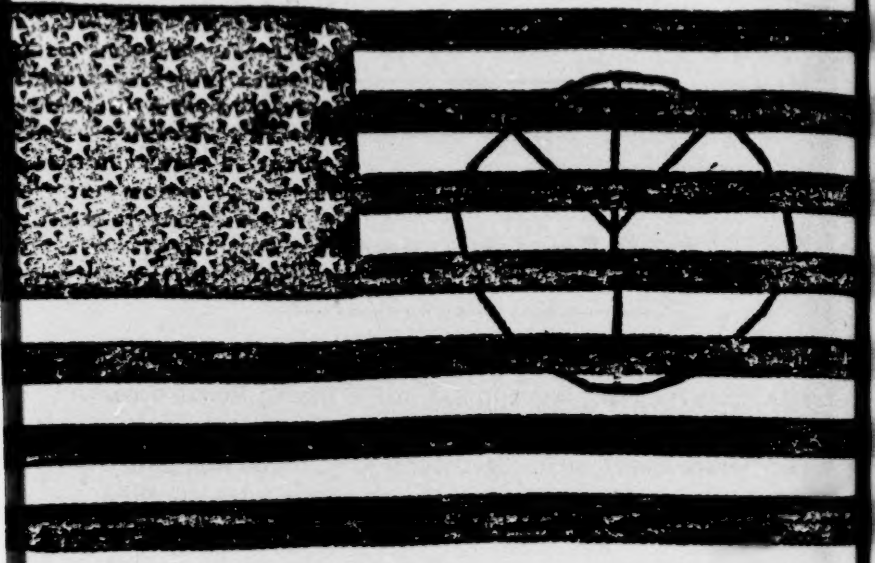
HAROLD OMAND SPENCE,

Respondent.

Defendant was charged in King County Justice Court with unlawfully displaying a flag of the United States upon which he had affixed a design or picture to both surfaces. The Justice Court, sitting without a jury, found him guilty and sentenced him to 90 days' confinement with 60 days suspended. Defendant appealed to the King County Superior Court where a jury found him guilty. On an agreed statement of facts, he appealed the judgment and sentence of 10 days' confinement, suspended, and a fine of $75, and costs entered on the verdict. The Court of Appeals reversed with one judge dissenting (5 Wn. App. 752 (1971)); the state obtained review by appeal to this court under Rule on Appeal II-2, and we reverse the Court of Appeals.

That the flag (exhibit No. 3) upon which defendant had taped a picture or diagram was an actual flag of the United States is clear, so acknowledged by both prosecution and

defense and so recognized by this court. It measures about 58 inches long and 35 inches wide. On both faces, defendant had outlined in glossy, black plastic ½-inch tape a large circular diagram about 19½ inches in diameter, inside of which was laid out in the same plastic tape another symbol resembling a trident.



The trident consisted of a 19½-inch line of plastic tape forming a vertical diameter and two 10-inch lines running from the approximate center on either side of it to intersect the circumference at a point approximately 6 inches from either side of the diameter. The whole design was set in about 4 inches from the top of the flag, 9¼ inches from the bottom, and about 6½ inches from either edge. It thus occupied nearly one-half of the entire surface of the flag. Defendant calls it a symbol of peace. He had placed the

symbol on both surfaces of the flag and suspended the flag upside down from his apartment window. According to the agreed statement of facts:

> The uncontroverted testimony of the state's witnesses, three Seattle police officers, was: they observed a flag with a masking tape peace symbol attached thereto, hanging upside down out of a window at 1006 E. Prospect Street, Seattle, Washington; they entered the main door of the apartment building and were met by the defendant who said, "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down"; the defendant allowed the officers to enter his apartment where the flag was located; the officers arrested the defendant and seized the flag; the defendant co-operated with the police officers.
>
> The state introduced, and the court admitted, the flag with the masking tape peace symbol. (It was identified as Exhibit No. 3). The state rested its case.
>
> The defendant, Mr. Spence, took the stand and testified on his own behalf. The defendant testified that he put a peace symbol on the flag and displayed it to public view as a protest to the invasion of Cambodia, and the killings at Kent State University, both of which had occurred a few days previously. Mr. Spence said his purpose of putting the peace symbol on the flag was to associate the American flag with peace instead of war and violence. He testified that he choose [*sic*] masking tape so that the peace symbol could be removed without damaging the flag. He said that he did not know that placing masking tape on a flag was against the law.

Defendant was not convicted of violating the flag desecration statute. RCW 9.86.030. *See State* v. *Turner*, 78 Wn. 2d 276, 474 P.2d 91 (1970). He was convicted of violating RCW 9.86.020(1) and (2), the alteration or improper use statute, which states:

> No person shall, in any manner, for exhibition or display:
>
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement;

Defendant attacks the constitutionality of RCW 9.86.020 (1) on two grounds: (1) that it violates the freedom of speech guarantees of the first amendment to the Constitution of the United States, and article 1, section 5, of the Constitution of the State of Washington, and (2) that the statute is unconstitutionally vague and overbroad when read with RCW 9.86.010, which states:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purport-

ing to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

Defendant said that the diagram stood for peace. It depicted his protest against the invasion of Cambodia by American troops, and the killing of students at Kent State University when a unit of the Ohio National Guard fired upon them during a student demonstration. Both the invasion of Cambodia, an American military action undertaken by United States forces as an operation of the Vietnam war, and the shootings at Kent State had occurred shortly prior to the events of this case. Defendant said that he was unaware that taping the symbol upon and displaying the flag was against the law. He did not contend, however, that he was unaware that the cloth upon which he affixed the symbol was an actual flag of the United States of America.

As to his knowledge of the law, that point is readily determined by the long-standing and basic principles upon which our legal system depends, that all sane persons are presumed to know the law and are in law held responsible for their free and voluntary acts and deeds. 21 Am. Jur. 2d *Criminal Law* § 94 (1965).

Defendant first contends that the prosecution failed to supply evidence and the court refused to instruct that an element of the offense charged was criminal or evil intent, and that, therefore, he should have been acquitted because of the state's failure to prove an element of the crime charged. He cites, *inter alia, State* v. *Turner, supra,* a flag burning and desecration case maintained under RCW 9.86.030. That holding, in our view, does not support defendant's position, but contrarily militates against it, for

it is based upon the fundamental distinctions between conduct proscribed as malum prohibitum and conduct malum in se.

In *Turner*, the defendant was charged under RCW 9.86.030 (amended in Laws of 1969, 1st Ex. Ses., ch. 110, p. 823), with flag desecration by burning, and we held that intent to desecrate was an element that must be established by the prosecution. Under RCW 9.86.020, however, under which the complaint here is laid, evil intent or design is not an element. A violation is complete when one knowingly places any word, figure, mark, picture, design, drawing or advertisement upon the flag of the United States, or flies a flag so marked. All that is required to complete the offense is to knowingly perform the prohibited act, and it is immaterial—except for consideration of punishment—whether the act was done with an evil motive or an exalted one. The question of criminal intent or evil purpose, therefore, does not arise in this case for the charge was laid not under the flag desecration statute, which has been held to define an offense malum in se, but rather was brought under the flag alteration or improper use statute (RCW 9.86.020), defining offenses malum prohibitum, and requires no proof of evil or criminal intent or design, but only that the act was voluntarily and knowingly done. *Cf. State* v. *Turner, supra;* Desecration of the flag of the United States; penalties, 18 U.S.C. § 700 (Supp. 1972).

The object to which defendant affixed the tape symbol was an actual flag of the United States. 4 U.S.C. § 1 (1927). It conformed to the official design prescribed in 4 U.S.C. § 1 (1927), as augmented by executive orders of the President adding additional stars for additional states admitted into the Union (4 U.S.C. § 2 (1927)). It was thus a flag of the

United States within the protective provision of 4 U.S.C. §3 (1927), prohibiting the printing, painting, attaching or affixing any word, figure, mark, picture, design, drawing or advertisement upon, or displaying a flag so adorned within the District of Columbia, a statute quite similar in language to that now before us.

Defendant contends that the statute is unconstitutionally overbroad and vague, made so by RCW 9.86.010, which relates to such things as standards, colors, ensigns or shields. Although defendant might profess doubts as to what these latter devices are, there is no doubt but that the statute adequately informed him with reference to the article he used—an actual American flag. The prohibited conduct whereof defendant was charged, we think, was described in the statute and in the complaint in language sufficiently clear and concise as to be comprehended by a person of ordinary understanding.

> [A]lmost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel.

Harlan, Justice, concurring in the result in *Cole* v. *Richardson*, 397 U.S. 238, 240, 25 L. Ed. 2d 275, 90 S. Ct. 1099 (1970); *Cole* v. *Richardson*, 405 U.S. 676, 683, 31 L. Ed. 2d 593, 92 S. Ct. 1332 (1972). Defendant made no claim whatever that he did not know that the article he suspended from his apartment window was a flag of the United States. Thus, as applied to him, the charge was well laid and the statute constitutionally precise. The conduct whereof he was convicted was clearly prohibited and specifically charged.

That there are ways and means other than those charged by which the statute may be violated does not render it

vague and overbroad as to the particular conduct charged if an understanding of the conduct prohibited can be reasonably drawn from the act. In *Zicarelli* v. *New Jersey State Comm'n of Investigation*, —— U.S. ——, 32 L. Ed. 2d 234, 238, 92 S. Ct. 1670, 1674 (1972), defendant argued that the "immunity provided by the New Jersey statute is unconstitutionally vague because it immunizes a witness only against the use and derivative use of 'responsive' answers and evidence."

In holding untenable the contention of vagueness, the court, *inter alia*, said:

> This is not the technical construction of "responsive" in the legal evidentiary sense that appellant fears, but rather is a construction cast in terms of ordinary English usage and the good-faith understanding of the average man. The term "responsive" in ordinary English usage has a well-recognized meaning. It is not, as appellant argues, "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

Defendant is in no position to conjure up hypothetical behavior which, while colorably actionable, would render the statute vague or overbroad when the particular conduct charged is clearly within the statute. One may not urge the unconstitutionality of a statute unless he has been adversely affected by the features of it which he claims are unconstitutional. *State* v. *Lundquist*, 60 Wn.2d 397, 374 P.2d 246 (1962); *State* v. *Human Relations Research Foundation*, 64 Wn.2d 262, 391 P.2d 513 (1964).

The judicial power to declare a legislative act unconstitutional should not be exercised in hypothetical cases. *United*

States v. *Raines*, 362 U.S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960); *State* v. *Dizon*, 78 Wn.2d 796, 479 P.2d 931 (1971). This principle, we think, finds new support in *Grayned* v. *City of Rockford*, —— U.S. ——, 33 L. Ed. 2d 222, 92 S. Ct. 2294, 2298 (1972), which considered an antinoise ordinance from two separate standpoints, (a) vagueness, and (b) overbreadth. That opinion held neither vague nor overbroad an ordinance which said that no person, while on or adjacent to any school grounds or building, "shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

A criminal statute is unconstitutionally vague when it leaves the standard of guilt to the variant views of the different courts and juries which may be called upon to enforce it. *Grayned* v. *City of Rockford, supra.* Thus, a statute making it a criminal offense to exact any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries was held unconstitutionally vague because one charged under it would not be informed of the nature and cause of the accusation (*United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 65 L. Ed. 516, 41 S. Ct. 298 (1921)); but a statute prohibiting the sale of goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor, including as it did the element of predatory intent, was held good. *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963). It is thus the rule that, if the general class of offenses to which a penal statute is directed falls plainly within its terms and can be made constitutionally definite by a reasonable construction, the statute will not be held unconstitutionally vague even though marginal cases could be conjured up where doubts of constitution-

ality would arise. *United States* v. *Spector*, 343 U.S. 169, 96 L. Ed 863, 72 S. Ct. 591 (1952). Where possible, it is the duty of the courts to give to a statute the construction which sustains its constitutionality, even though it might be susceptible of a different interpretation. *United States* v. *Rumely*, 345 U.S. 41, 97 L. Ed. 770, 73 S. Ct. 543 (1953); *State* v. *Dixon, supra,* and cases cited therein. Similarly, an oath required of all Massachusetts public employees not only to uphold and defend the constitutions, but to oppose the overthrow by force, violence, or any illegal or unconstitutional method, was held neither unconstitutionally vague, nor otherwise invalid despite the contention that the word *oppose* could conceivably be construed to demand active combat against those who would overthrow the government by force, violence, or other unconstitutional means. *Cole* v. *Richardson*, 405 U.S. 676, 31 L. Ed. 2d 593, 92 S. Ct. 1332 (1972).

Defendant also contends that the flag statute under which he was convicted is unconstitutional for overbreadth because it impairs his freedom of speech as guaranteed under the First Amendment. Placing the device on the flag, he says, was symbolic speech. When a statute impairs the right of freedom of speech prima facie, he urges, there is no presumption of its constitutionality, and the state has a heavy burden of sustaining it.

We are unable to sustain such sweeping condemnations of what appears to be a straightforward and precisely declared prohibition of placing either words, figures, marks, designs, drawings or advertisements upon a flag of the United States, or displaying such flag after this has been done to it.[1]

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[1] We think it inappropriate and fruitless to initiate an analysis of those recent cases which relate to freedom of speech, "fighting

The assertion made here of symbolic speech as a basis for sustaining the claim of unconstitutional vagueness and overbreadth is, we think, as nebulous, vague and overbroad as the statute here applied is narrow and precise. The statute does not purport to inhibit speech of any kind whether actual or symbolic, printed or auditory; it merely says that one cannot use the flag of the United States as the material upon which to print his utterance; he cannot lawfully employ the flag as a billboard, poster, or placard upon which to print his message.

Case authority upon which defendant relies, to sustain his claim of freedom of symbolic speech exercised by attaching signs or symbols upon an actual flag, are inapplicable. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943), went no farther than to hold that neither children nor their parents could be punished for refusing to salute the flag if they had bona fide religious convictions against doing so. *Stromberg* v. *California*, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931), referred to by defendant, merely held that the state could not constitutionally prohibit the display of a red flag as a

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words," and public obscenity as inaugurated in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); *Terminiello* v. *Chicago*, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949); *Feiner* v. *New York*, 340 U.S. 315, 95 L. Ed. 295, 71 S. Ct. 303 (1951); *Cox* v. *Louisiana*, 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965), culminating in *Cohen* v. *California*, 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971), in which a jacket proclaiming an obvious obscenity against enforcement of the draft laws, was conspicuously worn by the accused while walking through the Los Angeles County Courthouse; the wearing was held protected by the First Amendment despite oft-repeated judicial assertions that public obscenity is not so protected, and since the words did not appear to be directed toward any person but to the conscription laws in general, they could not be held to be "fighting words."

sign of opposition to the government. It did not involve a flag of the United States, nor any defacement of it. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), held that students could not be precluded from wearing black arm bands as a symbol of protest against the American participation in the Vietnam war. *Street* v. *New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), involved a charge of *desecration* of the flag by words directed against it and the burning of it. It reversed the conviction, as we understand, for the reason that the court could not ascertain from the record whether defendant had been convicted for what he *said* about the flag, or what he *did* to it. There was, moreover, no circumstance there in which it could be said that Street was using so-called "fighting words," or inciting a public disturbance, violence, or riot, or was engaged in conduct which at that time and place would be likely to do so. And finally, *Long Island Vietnam Moratorium Comm.* v. *Cahn,* 437 F.2d 344 (2d Cir. 1970), cited by defendant, does not concern an actual flag of the United States, but merely a red, white and blue circular design with the asserted peace symbol superimposed upon it.

The issue in this case, then, is not whether the legislature in enacting RCW 9.86.020 has intended to or actually curtailed or impaired the rights of this defendant to speak freely or to communicate his ideas to others, for there is nothing about the statute which would do this. As applied to him, the statute does not bar the defendant from buying, printing, marking, proclaiming, denouncing, carrying, advocating, or displaying upon any kind of material or object he chooses whatever idea he wishes to communicate to

others except upon a flag of the United States. Nor does the state contend that he can be required to pay public obeisance to the flag, or compel him to pledge allegiance to it. *See State ex rel. Bolling* v. *Superior Court*, 16 Wn.2d 373, 133 P.2d 803 (1943), holding that children whose parents were members of Jehovah's Witnesses could not be compelled to pledge allegiance in the public schools. The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States —and perhaps other official symbols which are not before us—as a medium of communication. The larger issue, therefore, is whether a state—or the United States—can constitutionally bar the public employment and display of a flag of the United States, the official emblem of the nation, as a backing or as background material, or as a billboard poster or placard for advertising a cause, philosophy, religion or product. We note that the statute does not bar the carrying of the American flag in connection with other banners, flags, signs, symbols or devices, but only the altering or adorning of it, or a symbol representing it, by placing foreign and extraneous materials, marks or symbols upon it. Thus, whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal—so minuscule and trifling as to come within the de minimis non curat lex rule. Defendant's freedom of speech and communication is no more impaired by this statute than would his rights to symbolic speech be abridged by an antinoise ordinance prohibiting the use of sound tracks at certain places and hours or the needless sounding of automobile horns and bells—or unnecessary noise next to a school. *Grayned* v. *City of Rockford*, —— U.S. ——, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

The nation has a right to adopt a national emblem and the states have a right to protect it. The nation and the state have a constitutional right to declare that the flag of the United States, as a national symbol, is not available to anyone for use as a backing nor may it be altered for purposes of creating a medium for self-advertising, whether that advertising be the dissemination of one's private views on life and things in general, or of a commercial product or service. We think it beyond argument that the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment and alien markings and designs.

The rule contended for by defendant, that his claimed right to affix a conspicuous symbol upon the flag of the United States is an integral component of his freedom of speech, has grave portent. If this defendant had this right, if the state cannot keep the flag of the United States free of extraneous signs, markings, pictures, designs, drawings and advertisements, then, of course, that right to put them there belongs equally to everyone. Banks and finance companies could, with equal claim of right, proclaim their solvency or the insolvency of business rivals with the dollar sign overprinting the flag; cattlemen with pictures of prize animals; or canneries with facsimiles of canned goods. If defendant's view of the constitution were sound, then nearly everything offered, sold, hawked or delivered could lawfully in one way or another be advertised upon the flag of the United States, and the several states and the United States would be without power to prevent it.

And that is not the end of it: There is the realm of political, social, religious and philosophical ideas. If defendant cannot be constitutionally barred by law from affixing and displaying what he describes as a peace symbol

upon the flag of the United States, neither can he be constitutionally prevented from proclaiming the Ku-Klux Klan upon it, nor the swastika, nor the hammer and sickle, either in advocacy of the Ku-Klux Klan, or Nazism, or Communism, or in opposition to these movements. Nor could he be stopped from utilizing the flag as a medium of display for whatever religious signs or symbols of whatever religion, new or old, he might espouse or detest. In short, if the defendant were right, the state and the United States could not lawfully prevent the flag from being actually employed as a billboard, placard, or backing for advertising proclaiming anything and everything imaginable.

We think the state can constitutionally keep the flag free of extraneous symbols, pictures and signs. There are thousands of other means available to the defendant for the dissemination of his personal views, and depriving him of the flag of the United States as one of them does not in our opinion measurably impair his freedom of speech.

The constitutionality of a similar flag statute, as it applied to the picture of a flag printed on a bottle of beer, was questioned in *Halter* v. *Nebraska,* 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907). There the statute prohibited the placing of or the exhibition or display of any flag of the United States upon which had been placed any word, figure, mark, picture, design, drawing or advertisement and punished violations as a misdemeanor. In sustaining the constitutionality of the Nebraska flag statute, the court said:

> And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship

> and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good.

and, further,

> It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that and, in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge.

Accordingly, the Court of Appeals is reversed and the cause remanded to the King County Superior Court for reinstatement of the judgment and sentence.

HALE, *C.J.*

WE CONCUR:

ROSELLINI, *J.*
HUNTER, *J.*

WRIGHT, *J.*
COCHRAN, *J. Pro Tem*

No. 42256

STAFFORD, J. (Concurring in the Result Only)—I concur in the result reached by the majority. I cannot, however, agree with the manner in which the majority has dealt with the problem of overbreadth in the area of the first amendment to the United States Constitution. The cases cited in support of the majority's position are not, for the most part, first amendment cases. Using non-first amendment cases to support a first amendment issue undermines the majority rationale. For this reason I concur in the result only.

STAFFORD, J.

I concur, HAMILTON, J.

No. 42256

FINLEY, J. (dissenting)—On May 10, 1970, thousands of young Americans felt moved to protest the U.S. invasion of Cambodia and the killings at Kent State University which had occurred a few days previously. The young man before this court joined in this expression of dissatisfaction by displaying an American flag (his own personal property) from a window of his apartment. The flag was displayed in an upside down position. A reasonable facsimile of the symbol of peace, currently well-recognized as such by most young people and also by many older people, had been superimposed on the flag by the use of adhesive black elec-

trical tape. This same peace symbol is worn as a medallion: It is embroidered or otherwise made a part of various parts of the wearing apparel of many young people, ranging from college down to high school and grammar grades. *This, as I view the circumstances, is the factual picture which emerges from this case. It is obviously significantly different from what arises from the majority's interpretation and extrapolation of the evidence.* It seems to me that this is, in essence, a case of a perhaps over-exuberant youthful advocate for peace and for ending the war in Vietnam.

His was an advocacy with which most people now rather wholeheartedly and well nigh unanimously agree. The President of the United States and his recent political opponent for the Presidency apparently agreed upon this, if nothing else. Even a majority of Congress—despite political party affiliations—I daresay are in substantial agreement. The only area of disagreement is in terms of the time and manner of ending the war and restoring peace in our time. The young man's action in displaying the flag adorned with the peace symbol in the manner indicated above might be regarded as an example of an idealistic and courageous appeal for world peace. However, he has apparently offended the sensitivities of certain more sedate citizens. In any event, *that any pernicious or baleful thing was contemplated or any evil intent actually involved is not substantiated by the evidence in this case.* And here, in essence, hangs the tale of my very respectful but nevertheless firm and substantial disagreement with the majority in this case. In other words, (a) there is, in ancient criminal law parlance, no proof of *mens rea; i.e.,* evil intent, and (b) proof of intent is, in my judgment, an essential element of the crime provided by RCW 9.86.020. Thus, as this court held in the opinion written by Hale, J., in *State*

v. *Turner,* 78 Wn.2d 276, 474 P.2d 91 (1970), the prosecution failed to prove a necessary element of the crime charged and the case simply should be dismissed on this basic and traditional ground.

It should be rather obvious that the majority's much sterner view, in construing and applying the facts of this case, leads not only to an oversimplified application of legal principles and rules, but to a grossly erroneous result. One consequence of the majority's approach, in addition to the failure to recognize the requirement that evil intent be proved, is that any objective consideration of First Amendment freedom of speech rights and concepts is brusquely swept aside, apparently simply to sustain conviction of the hapless young defendant. Contrariwise, the majority opinion of the Court of Appeals, in my best judgment, objectively construes the facts of this case, and reaches a better-reasoned, more rational disposition of this matter. In this connection, I intend to emphasize certain important considerations dealt with at considerable length in the majority opinion of the Court of Appeals by Horowitz, J., and to more fully discuss the requirement of the pertinent statute that evil intent must be proved.

The Court of Appeals objectively observed that a flag may be considered from two points of view: "(1) as a physical object, and (2) as a symbol of ideas." *State* v. *Spence,* 5 Wn. App. 752, 756, 490 P.2d 1321 (1971). In short, the view quite generally held is that "the American flag is an identifying, history-preserving and ideological symbol." 5 Wn. App. at 757. Indeed, the majority opinion itself contains more than one reference to the United States flag as a "symbol".

A symbol by its very being is expressive; so to display the American flag, if not pure expression or articulation,

is certainly a traditionally recognized and effective form of communication. *See* Note, 30 Maryland L. Rev. 332, 346 (1970). This conclusion is borne out by the determination of the U.S. Supreme Court in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 632, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943) that "[s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." Indeed, the well-recognized symbol of peace, which was here attached to the American flag, is equally a form of expression when displayed. The symbolic speech which is expressed by the display of such symbols is protected by the First Amendment to the United States Constitution. *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972) (picket signs); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969) (black armbands); *Stromberg* v. *California*, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532 (1931) (display of a red flag). *See* Note, 69 Colum. L. Rev. 1091 (1968). Consequently, one of the significant issues clearly before this court is whether the immediate statutory prohibition against affixing any design upon the flag is to take precedence over the defendant's invocation of the First Amendment protection of symbolic speech. *The majority either myopically or arbitrarily brush this issue under the rug.* The Court of Appeals did not duck the issue, but, in my judgment, evaluated it properly and determined that "a statute may protect the flag *if so to do protects the safety of the state against a clear and present danger.*" (Italics mine.) *State* v. *Spence*, *supra* at 759. In other words, the Court of Appeals held that no "clear

and present danger" existed to support the statute and its application in the instant case. 5 Wn. App. at 759. *See Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 86 L.Ed. 1031, 62 S.Ct. 766 (1942); *Schenck* v. *United States*, 249 U.S. 47, 63 L.Ed. 470, 39 S.Ct. 247 (1919); *State ex rel. Holcomb* v. *Armstrong*, 39 Wn.2d 860, 239 P.2d 545 (1952). In this regard, the Court of Appeals also determined that, where the demands of free speech seem to conflict with a protection of legitimate governmental interests, *such competing interests must be evaluated and balanced against each other* in order to determine whether the speech sought to be exercised will be constitutionally protected. *See United States* v. *O'Brien*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968). But, in this regard, the majority herein rather too simplistically and also arbitrarily state that they think it is "beyond argument" that the nation and state have a "recognizable interest" in keeping the flag free of "extraneous adornment". *This is not the law as is clearly shown by the cases cited above, and certainly does not address the issue before us.* The mistaken and perhaps somewhat result-oriented conclusions of the majority seem to me to fall far short of appropriate judicial treatment and resolution of the indicated very real constitutional question presented by this case. Furthermore, by adopting this incomplete approach to the serious question regarding the extent of the competing interest in protecting freedom of speech, the majority actually completely ignores the requirement established by the U.S. Supreme Court that these conflicting interests be resolved by a *careful balancing* procedure. As stated by the Court in *Thomas* v. *Collins*, 323 U.S. 516, 529-30, 531-32, 89 L.Ed. 430, 65 S.Ct. 315 (1945), substantial weight must be given First Amendment freedoms in applying this required balancing test:

> The case confronts us again *with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins.* Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.
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> . . .
>
> . . . [I]n our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. *Schneider* v. *State,* 308 U.S. 147, 161. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, *only if grave and impending public danger requires this.* (Italics mine.)

As to what constitutes legitimate means of securing governmental interests in competition with the First Amendment freedoms, the U.S. Supreme Court has recently stated:

> The nature of a place, "the pattern of its normal activities, dictates the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana,* 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our

cases make clear that *in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; . . .* (Italics mine.)

Grayned v. *City of Rockford*, 408 U.S. 104, 116, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972). In applying the balancing test required, it is my judgment that the Court of Appeals correctly determined that the passive means of communication utilized by the defendant in this case, under the particular circumstances involved, certainly constituted no "clear and present" or "grave and impending danger", and, on balance, outweighed the interest of the state—no matter how "recognizable"—in keeping the flag free of "extraneous adornment". As in *Police Department of the City of Chicago* v. *Mosley*, *supra*, the defendant's silent vigil was a peaceful means of communication, not prone to violence, and therefore is protected by the First Amendment. Additionally, as noted by the Court of Appeals, where the U.S. Supreme Court has held that words critical or contemptuous of the flag are protected by the First Amendment, certainly the attachment of a symbol to the flag—an innocuous act containing no disrespect for the flag—constitutes a protected form of speech, and is to be accorded greater weight than the competing interest of the state in this matter. *See Street* v. *New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).

The majority states as its reason for ruling that the defendant's means of expression should not receive the protection of the First Amendment that "whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal;" that "there are thousands of other means available to the

defendant for the dissemination of his personal views." It is historically undeniable that this type of reactionary, if not personally biased reasoning was the very sort that has led to and perpetuated unconstitutional deprivations of fundamental liberties in the past. In *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L.Ed. 256, 16 S.Ct. 1138 (1896), the U.S. Supreme Court noted that the statute being contested there provided for equal accommodations for blacks and whites in railway coaches, and ruled essentially that, since blacks had other adequate seats on the train, no need existed to allow them to occupy seats reserved for whites. This "other means available" logic of the "separate but equal" doctrine began to crumble in *Sweatt* v. *Painter*, 339 U.S. 629, 94 L.Ed. 1114, 70 S.Ct. 848 (1950), and was finally held by the Supreme Court to afford an unconstitutional treatment of blacks in *Brown* v. *Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954). In ruling as it did, the Court explicitly rejected the reasoning which the majority in this case advances in support of its conclusion. The fact that there may well be "other means available" is certainly no basis for depriving one of fundamental liberties, whether such freedom takes the form of choosing to sit in any seat in a train, or expressing personal views through the combined display of chosen symbols. In view of the United States Constitution's powerful protection of the freedom to speak one's mind, and almost innumerable decisions of the United States Supreme Court to this effect, it seems not only highly irregular and unnecessary but arbitrary and oppressive for the majority to hold otherwise in this case. I am therefore in agreement with the holding of the Court of Appeals that RCW 9.86.020, the improper display statute, as interpreted by the majority and applied

in this case constitutes an unconstitutional abridgment of free speech.

The majority, as indicated above, also suggests that proof of evil intent is not required in a prosecution under the immediate statute (RCW 9.86.020). I cannot agree. Although the conviction of the defendant should be reversed upon the basis that the statute violates the defendant's constitutionally-protected freedom of speech, I am firmly convinced that the trial court erred in refusing to instruct the jury that evil intent is an essential element of the offense charged. If proof of evil intent were not required, then the Court of Appeals correctly concluded that the patriotic editions of two Seattle newspapers (Seattle Post-Intelligencer, July 4, 1970 at page 1, and Seattle Times, June 14, 1970 § A, at page 1), in displaying a picture of the American flag with words and pictures over it, would be equally susceptible to criminal charges, since RCW 9.86.020 applies both to an actual flag and to a representation of the flag. RCW 9.86.010. Certainly I cannot distinguish, and I submit the majority herein cannot distinguish the defendant's actions from the pictures in the two publications simply because the patriotic message or communication of the newspapers seems to be a more preferable instance of the exercise of freedom of speech:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen* v. *California*, 403 U.S. 15, 24 (1971); *Street* v. *New York*, 394 U.S. 576 (1969); *New York Times* v. *Sullivan*, 376 U.S. 254, 269-270 (1964), and cases cited: *NAACP* v. *Button*, 371 U.S. 415, 445

(1963); *Wood* v. *Georgia*, 370 U.S. 375, 388-389 (1962); *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949); *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937).

Police Department of the City of Chicago v. *Mosley*, *supra* at 95. Indeed, such a distinction need not be made. Neither the publications of the newspapers nor the conduct of the defendant herein appear to have contained the element of evil intent which is necessarily required under RCW 9.86.020. We stated in *State* v. *Turner*, *supra* at 282, in determining whether the flag desecration statute (RCW 9.86.030) required proof of intent for conviction, that if such proof of evil design or purpose were not necessary, "the legislature could readily have said otherwise." It is therefore significant here that the legislature has also been silent regarding the element of intent in the crime of improper display of the flag (RCW 9.86.020). Certainly proof of evil intent must be necessary here as well. This conclusion is further supported by the very pertinent, applicable, and decisively phrased language of Justice Hale in setting forth the holding of the court in *State* v. *Turner*, *supra* at 283:

> Accordingly, unless the statute expressly eliminates the element of intent or design or defines the kinds of offenses which, by their very nature, are classified judicially as mala prohibita, the ingredients of intent, design and purpose *should be deemed indispensable* to a proof of guilt. (Italics mine.)

Actually, the reasoning of the court and the decision in *Turner* are absolutely inconsistent with the reasoning and result reached by the majority in the instant case. Furthermore, try as I may, I can find no reasonably convincing

justification for the inconsistency. In the instant case, the jury should have been instructed and should have considered and decided whether evil intent was present in the alleged violation of RCW 9.86.020, *i.e.,* whether the defendant intended, for example, to provoke a public disturbance, disorder, breach of the peace, or a riot. The task for the jury in determining the subjective intent of the defendant, is facilitated by such objective manifestations as the character of the design upon the flag, the manner of display, the circumstances of time and place, and the activities which accompanied such display. Unless the element of evil intent be proved *beyond a reasonable doubt,* no conviction under RCW 9.86.020 can be sustained.

Finally, in rejecting the defendant's overbreadth argument, the majority has confused and misapplied the distinct constitutional doctrines of "vagueness" and "overbreadth". This distinction was most recently recognized by this court in *State* v. *Oven,* 78 Wn.2d 909, 480 P.2d 766 (1971). "Vagueness" is found where the legislation fails to provide fair notice to the public of that which is being prohibited by the law. *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Edwards* v. *South Carolina,* 372 U.S. 229, 9 L.Ed. 2d 697, 83 S.Ct. 680 (1962); *Seattle* v. *Drew,* 70 Wn.2d 405, 423 P.2d 522 (1967). It is an element of due process which demands precision in penal legislation. *NAACP* v. *Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963). On the other hand, the "overbreadth" doctrine applies where the penal legislation prohibits not only unprotected behavior, but embraces within its scope some constitutionally protected activity, even though the language of the statute may

be sufficiently precise as not to be deemed "vague". *United States* v. *Robel,* 389 U.S. 258, 19 L.Ed.2d 508, 88 S.Ct. 419 (1967); *Freedman* v. *Maryland,* 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 12 L.Ed.2d 992, 84 S.Ct. 1659 (1964); *Shelton* v. *Tucker,* 364 U.S. 479, 5 L.Ed.2d 231, 81 S.Ct. 247 (1960); *Adams* v. *Hinkle,* 51 Wn.2d 763, 322 P.2d 844 (1958). In some cases the legislation may suffer from both infirmities by containing imprecise language (vagueness) and by prohibiting a constitutionally protected activity (overbreadth). *See Cox* v. *Louisiana,* 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453 (1964); *Winters* v. *New York,* 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948); *Seattle* v. *Drew, supra.*

Because of the majority's confusion of these two doctrines, it repeatedly rejects the defendant's overbreadth argument by asserting that RCW 9.86.020 is sufficiently precise (and therefore not *vague*) as applied to the defendant. In ruling upon this basis that the defendant may not raise the overbreadth issue in this case, the majority opinion states:

> Defendant is in no position to conjure up hypothetical behavior which, while colorably actionable, would render the statute vague or overbroad when the particular conduct charged is clearly within the statute. One may not urge the unconstitutionality of a statute unless he has been adversely affected by the features of it which he claims are unconstitutional.

In support of this pronouncement the majority cites authority which involved *neither the overbreadth doctrine nor the First Amendment, but rather which dealt with problems of "standing" under circumstances which are irrelevant*

to the immediate issue. In addition, the above statement of the majority, made in the context of a First Amendment case in which overbreadth of a statute is asserted, simply and directly contradicts the settled law of the land. In *NAACP* v. *Button, supra* at 432-33, the U.S. Supreme Court ruled as follows:

> [I]n appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98; *Winters* v. *New York, supra,* at 518-520. Cf. *Staub* v. *City of Baxley,* 355 U.S. 313. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchallenged delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus* v. *Search Warrant,* 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

Accord: Aptheker v. *Secretary of State, supra.* It is our duty, therefore, to consider that which *may* be proscribed by the statute, not simply the application of the statute to the facts of the case before us. The majority's use of non-First Amendment *vagueness* cases to rebut the defendant's First Amendment *overbreadth* challenge is both in error and improper. The "chilling effect" upon the exercise of protected freedoms of expression is the evil which the

overbreadth doctrine strives to eradicate. *Dombrowski* v. *Pfister,* 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965). The proper application of the doctrine in the case before us would provide a review of the statute under all possible circumstances, thereby insuring that the exercise of protected rights will not be deterred for either the defendant or the remainder of the public.

In this same area of overbreadth, the majority also rejects the defendant's challenge on the basis that "it is the duty of the courts to give to a statute the construction which sustains its constitutionality." *The error of this conclusion is evident from our own past decisions.* In *Adams* v. *Hinkle, supra* at 769, we held that "there is no presumption of constitutionality of statutes abridging those rights [of freedom of speech or press]." *Accord: Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 96 L.Ed. 1098, 72 S.Ct. 777 (1952). Thus the majority has again cited inappropriate authority for an erroneous conclusion with the unfortunate result that the challenge of the defendant has indeed fallen upon deaf ears.

Since the rulings of both the United States and Washington Supreme Courts require that we examine the merits of the immediate challenge of this statute's overbreadth, and that we do so without affording the statute any presumption of constitutionality, it is evident that the majority's sweeping and mistaken generalities have produced a curious anomaly in the constitutional law of this state. The fact that an "actual flag" was used in the instant case seems quite irrelevant since RCW 9.86.020 does not restrict its prohibition against affixing designs to an "actual flag". Indeed, the term "flag", as used in the immediate penal statute, is defined in RCW 9.86.010 as follows:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, *or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag,* standard, color, ensign or shield of the United States or of this state, *or a copy, picture or representation thereof.* (Italics mine.)

With this statutory definition in mind, the issue is whether the state has a compelling and overriding interest in prohibiting the public from affixing a design to a "picture or representation" of the flag, "made of any substance . . . evidently purporting to be . . . a copy, picture or representation" of the flag. Not only does RCW 9.86.020 require punishment for the two newspaper publications referred to earlier, it would equally demand punishment for a grammar school child's drawing of the flag which contained any patriotic slogan or other extraneous marking thereon. Thus, regardless of any personal feelings concerning the activities of the defendant before this court, it is evident that this statute goes too far. Its "chilling effect" is far-reaching. In proscribing innocent activities, the statute is overbroad, and in this respect is constitutionally inappropriate. Under these circumstances, I can find no solace in inapplicable case authority for the majority's proposition that this court may excuse one form of statutorily-prohibited conduct in *State* v. *Turner, supra,* and cavalierly condemn another as in the instant case. Since RCW 9.86.020 proscribes constitutionally protected conduct as to which no compelling state interest has been demonstrated, the

statute is overbroad on its face and therefore unconstitutional.

For the reasons stated, I would affirm the decision of the Court of Appeals to reverse the conviction of the defendant in this case.

FINLEY, J.

Order Denying Petition for Rehearing

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Appellant,

vs.

HAROLD OMAND SPENCE,

Respondent.

The Court having considered the respondent's petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 13th day of March, 1973.

By the Court:

Chief Justice

81 Wn.2d 788

Notice of Appeal Filed With the Supreme Court of Washington

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 42256

HAROLD OMAND SPENCE,

Appellant,

vs.

THE STATE OF WASHINGTON,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Harold Omand Spence appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Washington reversing the decision of the Court of Appeals and remanding the cause to the King County Superior Court for reinstatement of the judgment and sentence. The decision of the Supreme Court of the State of Washington was filed on January 18, 1973 and a petition for rehearing was denied in an order entered on March 13, 1973.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

PETER GREENFIELD
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(206) 725-2600

I, CHRISTOPHER T. BAYLEY, Prosecuting Attorney for King County, Washington, hereby acknowledge receipt of a copy of the foregoing notice of appeal to the Supreme Court of the United States this 9th day of April, 1973.

CHRISTOPHER T. BAYLEY